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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-967

CLAUDE CARTIER,

Petitioner,

v.

SECRETARY OF STATE and
COMMISSIONER OF IMMIGRATION
AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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1. The Solicitor General's opposing memorandum[1] is a strange document, no less so for what it leaves unsaid than for what it says. Thus, although recognizing, *Mem.* 1, that ultimately the question is whether the decision of the State Department's Board of Appellate Review should be given administrative *res judicata* effect, the Solicitor General nowhere as much mentions *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), the leading case on administrative *res judicata*, and where, 384 U.S. at 422, this Court swept away as relics of a bygone era, the last vestiges of *Pearson v. Williams*, 202 U.S. 281 (1906) and its progeny. *Pet.* 19. Nor does the Solicitor

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[1] Hereinafter cited in the text as *Mem.*

General as much as mention *Utah's* companion, *United States v. S & E Contractors, Inc.*, 406 U.S. 1 (1970), where, perforce, in the context in which the question there arose, this Court dealt somewhat differently with the problem of *seriatim* administrative decisions than it did in *Utah*, but reached the same result. *Pet.* 23-26. But, the Solicitor General neither undertakes to distinguish either of these cases, nor to argue their inapplicability. Rather, he is content to ignore their existence, and to cite cases, *Mem.* 5, which, apart from being otherwise irrelevant, were, with one exception, decided before *Utah*. And so far as appears, *Utah* was not cited to the court which decided the exception. See, *Lim v. Mitchell*, 431 F2d 197; *Mem.* 5, fn. 7. Perhaps, it is also true of the Solicitor General that, as the court below said, *Pet.* 20, *App. A., 11a, 12a, fn. 3:*

> It would appear that the rapid sweep of the law may have left the Commissioner behind. The cases that he cites in support of his argument that *res judicata* is ordinarily inapplicable to administrative determinations have been largely discredited by the Supreme Court. *See*, United States v. Utah Construction & Mining Co., 384 U.S. 394, 421, 422, n. 19, n. 21 (1966).

But we think this highly unlikely in view of the broad scope of the Solicitor General's official interests, as compared with the respondent Commissioner's, and the wide variety of circumstances in which the courts have held, both before and since *Utah*, that administrative *res judicata* applies. *Pet.* 22, *App. A., 11a, 12a, fn. 3.* Perhaps it is just reflective of a yearning for the good old days when each department and agency was a law unto itself, and confident of its own superiority, would not be bound

by the decisions of any other, which, it goes without saying, could not possibly have the qualifications necessary to make them.

2. Nor is this altogether fanciful. Consider for a moment, the Solicitor General's contention, *Mem.* 5, fn. 6, that "the question of petitioner's citizenship was never properly before the State Department Board of Appellate Review" because the Board was "set up only to review 'administrative holdings' of the Department", citing 22 CFR 50.60, and there was no "prior 'administrative holding' *that he was not entitled to a certain right or privilege of citizenship*", the State Department's "certificate of loss of nationality" being a "purely ministerial act" having "no independent legal effect". [Emphasis supplied.]

But, 22 CFR 50.60, *Pet. App. E, 33a,* does *not* require, as a prerequisite for an appeal to the Board, a prior administrative holding that the appellant was "not entitled to a certain right or privilege of citizenship". What it requires is a prior "administrative holding of *loss of nationality*", which is, precisely, what the Department of State considers its certificates of loss of nationality to be. [Emphasis supplied.]

Thus, on October 14, 1971, Frances G. Knight, director of the Passport Office, Department of State, since 1955,[2] wrote, *R. Doc. 16, pp. 65, 64,* in pertinent part:

* * *

> When Mr. Cartier [the petitioner] appeared at the American Embassy at Bern***on January 17, 1964***he subscribed to an oath of renunciation of the nationality of the United States in the form prescribed by the Depart-

[2] See listing, 1 *Who's Who 1972-1973,* p. 1746.

> ment. A certificate of loss of nationality of the United States showing his expatriation on January 17, 1964 under Section 349(a)(6) of the Immigration and Nationality Act was approved by the Department on March 26, 1964.
>
> If Mr. Cartier can show that the decision that he lost citizenship was contrary to law or fact, his case will be certified to the Board of Appellate Review as an appeal.***
>
> The procedures for Review of Loss of Nationality are published in 22 CFR 50.60-50.72. A copy of the procedures is enclosed***.

* * *

Petitioner's petition of appeal to the Board of Appellate Review, *R. 59,* from the holding of the certificate of loss of nationality referred to in Miss Knight's letter, *R. 68, Doc. 16, p. 24,* was delivered to the Department of State on January 27, 1972. *R. 30.* In acknowledging its receipt by letter dated February 23, 1972, *R. 39,* Francis G. Rando, Chief, Foreign Operations Division of the Passport Office of the Department of State, wrote in pertinent part:

> In the circumstances of Mr. Cartier's case, his petition is deemed to warrant certification to the Board of Appellate Review as an appeal. The entire file is being forwarded to the Board for its attention.

Further, at the outset of the hearing before the Board of Appellate Review on petitioner's appeal, the Board's chairman noted, *R. Doc. 18, pp. 3, 4,* that the proceeding was "pursuant to the provisions of Tit. 22, Section 50.60-50.72 of the Code of Federal Regulations", *Pet. App. E, 33a-37a,* and that what was involved, as shown by what had been certified to the Board, was

> the Amberican [*sic*] Embassy at Bern*** executed a certificate of loss of the nationality of the United States on January 17, 1964, which certifies that Claude Cartier***expatriated himself***by executing a formal oath of renunciation of the nationality of the United States. The certificate of loss of nationality of the United States concerning Mr. Cartier, was approved by, and under authorization of, the Secretary of State on March 26, 1964.

And Gerald M. Brown, one of the government lawyers opposing the appeal,[3] recited, at the outset of his argument, the fact of petitioner's renunciation, and continued, *R. Doc. 18, pp. 3, 5, 6:*

> And subsequent to this oath of renunciation, a certificate was prepared by the Consul in Bern and forwarded to the Department, and it was ultimately approved.
>
> Now, it is from this decision that this appeal is taken.

Certainly, to conclude in a report that certain acts *have* resulted in loss of nationality by the actor, is *necessarily* to decide, determine or hold that the actor has lost his nationality by reason of such acts. And, that is precisely the essence of a certificate of loss of nationality made by a diplomatic or consular officer, and approved by the Secretary of State, as provided by §358 of the Immigration and Nationality Act, Tit. 8 U.S.C. §1501, and the Department of State's regulations, 22 CFR §§50.41, 50.50, 50.51.

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[3] The other government lawyer opposing petitioner's appeal was Francis G. Rando, referred to in the text. They not only opposed the appeal at the hearing, but in legal memoranda submitted to the Board. *R. Doc. 16, pp. 86-82, 113.*

The Solicitor General and the respondent Commissioner to the contrary, that is the understanding of the Department of State of its own regulations and procedures. And, the courts agree. Thus, in *Linzalone v. Dulles,* 120 F. Supp. 107, 109 (S.D.N.Y. 1954), the Court held that the issuance of a certificate of loss of nationality is "a final administrative determination of***loss of nationality by the Department of State." Similarly, in *Peter v. Secretary of State,* 347 F. Supp. 1035, 1037 (D.C.D.C. 1972), where the plaintiff had unsuccessfully appealed to the Board of Appellate Review from the issuance of a certificate of loss of nationality relating to her, Judge Richey, speaking for a three-judge Court (Fahy, *Cir. J.* and Hart, *J.*) referred to the action of the Board as an affirmance of "the prior determination".

3. The Solicitor General curiously argues, *Mem.* 4, 5, in effect that since respondent Commissioner and the Secretary of State have "concurrent authority" in circumstances such as petitioner's, to make citizenship determinations, administrative *res judicata* does not apply. But, patently, *res judicata,* judicial or administrative, is applicable *only* when there is concurrent jurisdiction. In its absence, *res judicata* obviously has no office to fulfill.

No less curiously, the Solicitor General also argues, *Mem.* 4, that the court below "*properly* decline [d] to give *res judicata* effect" to the decision of the Board of Appellate Review or "to consider whether the Attorney General had authority to review and override" it, because the "[r]esolution of these issues *was unnecessary to the court's decision,* which rested upon the availability of 8 U.S.C. 1503 ***". [Emphasis supplied.] But this is a circular argument, for the very question here is whether principles of *res judicata* were applicable to foreclose the respondent Commissioner from making a determination contrary to the Board's, thus rendering the availability of an action

under Tit. 28 U.S.C. §2201, as indicated in Tit. 8 U.S.C. §1503, entirely irrelevant.

Again, the Solicitor General in effect argues or, rather, merely pronounces *ex cathedra,* for he neither cites author ity nor advances principle in his support, that *res judicata* is inapplicable to the decision of the Board of Appellate Review of the Department of State, because "only the federal courts may make final and binding declarations of citizenship", and this, in actions under Tit. 28 U.S.C. §2201, to which Tit. 8 U.S.C. §1503(a) relates. *Mem.* 5. However as petitioner has already noted, *Pet.* 15, 16, in *Rusk v. Cort,* 369 U.S. 367, 375-377 (1962), this Court made it plain that Tit. 8 U.S.C. §1503(a) is merely declaratory of preexisting law as fashioned by the courts under the generality of Tit. 28 U.S.C. §2201, *e.g., Perkins v. Elg,* 307 U.S. 325 (1939), aff'g. *Perkins v. Elg,* 99 F2d 408 (D.C. Cir. 1938), and that the remedies specified in Tit. 8 U.S.C. §1503 are *not* exclusive, and have no special standing. But, as in the case of *Utah* and *S & E, supra,* the Solicitor Gen eral would ignore *Cort,* and whisk it behind a wall of silence.

4. By his description of what transpired at the hearing before the Board of Appellate Review, *Mem.* 2, the Solicitor General would imply, although he does not say so baldly, that the proceedings before the Board were something other than adversary, quasi-judicial proceedings, in which the government was represented by counsel. But, in words that once rang familiar in public debate, "let's look at the record", which the Solicitor General does not deign to cite.

Far from not taking evidence, as the Solicitor General claims, petitioner, as appellant before the Board, submitted evidence in the form of his duly sworn petition for appeal, *R. 59,* and by leave of the Board, without objection,

R. Doc. 18, pp. 70, 71, a supplemental affidavit, also duly sworn to by him. *R. 71.* He was present at the hearing, which he requested, offered to testify, *R. 39; R. Doc. 18, pp. 3, 20, 57,* and submitted certain documentary evidence which was received without objection from the government attorneys of the Passport Office, who appeared and argued in opposition to the appeal. *R. Doc. 18, pp. 3, 4-6, 52-57; R. Doc. 16, pp. 45-30.* Although petitioner was not actually sworn, since neither the Board nor the government attorneys opposing the appeal apparently saw any need for so doing, *Cf.* Tit. 18 U.S.C. §1001, he was asked and responded to questions put to him by members of the Board, without objection, and by the government attorneys opposing the appeal. *R. Doc. 18, pp. 50, 58-61, 63-70.* The Board heard argument on the facts and the law, in support of the appeal, by petitioner's attorney, and, *contra,* by the government attorneys of the Passport Office. *R. Doc. 18, pp. 4-16, 20-49.* Additionally, legal memoranda in support of the appeal, and in opposition to it, were submitted to the Board by the attorneys for petitioner and by the government lawyers of the Passport Office. *R. Doc. 16, pp. 70-67, 86-82, 102-96, 114, 117-115.*

Although under the regulations of the Department of State the Passport Office had the right to submit evidence and produce witnesses, 22 CFR §§50.66, 50.67; *Pet. App. E, 35a, 36a,* the government attorneys of the Passport Office opposing the appeal, produced no witnesses, and submitted no evidence other than the petitioner's file, *R. Doc. 16,* as it was then constituted, which the regulations require to be included in the record before the Board. 22 CFR §50.70; *Pet. App. E, 36a.* In essence, the position of the government lawyers of the Passport Office opposing the appeal, was that neither on the facts nor the law had petitioner made a case for reversal of the administrative

holding from which he had appealed. *R. Doc. 18, pp. 4-16; R. Doc. 16, pp. 86-82, 114.* The Board, one member dissenting, held otherwise in a 15 page decision. *R. 6.*

Indeed, the proceedings before the Board hardly differed from the proceedings in the District Court on the motions for summary judgment, *Pet.* 8-11, except for the augmentation of the written evidence before the Board by the questioning of petitioner by members of the Board and the government lawyers of the Passport Office who appeared in the matter pursuant to 22 CFR 50.66, 50.67; *Pet. App. E, 35a.* If the proceedings before the Board were not adversary, quasi-judicial proceedings in which the government was represented by counsel, then, by the same token, the summary judgment proceeding before the District Court was not an adversary judicial proceeding in which the government was represented by counsel – unless, of course, one is of the view that "the government" is not really and truly represented by counsel, even in departmental and agency proceedings, except by lawyers of the Department of Justice.

The petition should be granted.

Respectfully submitted,

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